In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-160

RICHARD E. WILES, JR. AND KAREN B. WILES, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The sole question raised by the petition is whether, as the courts below held, petitioner[1] realized a taxable gain upon his transfer of certain appreciated securities to his former wife pursuant to a property settlement incorporated in a Kansas divorce decree.

In 1965, petitioner's former wife filed a petition for divorce in the Kansas state courts (Pet. App. 40). Negotiations between the parties resulted in a property settlement agreement (later incorporated in the divorce decree) under which, in lieu of alimony and as a division of property, the parties would combine the total value of their separate properties and make whatever adjustment necessary so

[1]References to "petitioner" are to Richard E. Wiles, Jr. Karen Wiles is a party solely because she filed a joint return with her husband for the year at issue.

that each would receive an equal share of their combined separate holdings (Pet. App. 43). The value of petitioner's separate property exceeded the value of the property in his wife's name. Pursuant to the agreement, petitioner transferred to her appreciated securities having an assigned value in excess of $500,000 (Pet. App. 48).

On audit, the Commissioner determined that the transfer constituted a taxable sale or exchange with respect to which petitioner realized capital gains measured by the difference between his basis in the stock and its fair market value as of the transfer. Relying on this Court's decision in *United States* v. *Davis,* 370 U.S. 65, the Tax Court sustained the Commissioner's determination and held that the transaction constituted a taxable exchange and not, as petitioner contended, a nontaxable division of property between co-owners (Pet. App. 48-60). The court of appeals affirmed (Pet. App. 24-36).

1. Contrary to petitioner's contention (Pet. 9-13), the decision of the court of appeals is not in conflict with *United States* v. *Davis,* 370 U.S. 65. In that case, this Court held that a husband's transfer of his separately owned appreciated property in divorce proceedings, in return for which he received a release of the wife's marital rights, constituted a taxable event to the husband upon which gain was recognized. The Court concluded that the transaction was analogous to a transfer of property for the release of an independent obligation of the husband and rejected taxpayer's contention that the transfer was a nontaxable division of property between co-owners since, under the applicable Delaware law, a wife was not a co-owner of her husband's separate property.

In following the *Davis* decision, the courts have uniformly treated transfers of a husband's separate property for the release of marital rights as taxable events. See, *e.g., Pulliam* v. *Commissioner,* 329 F. 2d 97 (C.A. 10), certiorari

denied, 379 U.S. 836, and *Wallace* v. *United States*, 439 F. 2d 757 (C.A. 8). As this Court recognized, the only exception to the rule in *Davis* is where the transfer is made pursuant to a division of property between co-owners. As a result, the lower courts have given appropriate consideration to state law to determine the nature of the parties' ownership interests in the property being transferred. See *Beth W. Corp.* v. *United States*, 350 F. Supp. 1190 (S.D. Fla.), affirmed, 481 F. 2d 1401 (C.A. 5), certiorari denied, 415 U.S. 916; *Collins* v. *Commissioner*, 412 F. 2d 211 (C.A. 10); *Cofield* v. *Koehler*, 207 F. Supp. 73 (D. Kan.).

The courts below correctly concluded that petitioner's transfer of stock was a taxable sale or exchange and not a nontaxable division of property. Here, as in *Davis*, petitioner transferred property to his former wife pursuant to a property settlement agreement in return for a release of all of his wife's marital rights, including her right to claim alimony and, under applicable Kansas law, her inchoate marital rights of inheritance and statutory dower (Pet. App. 27-28). The wife's marital rights here were not descendible and she had to survive petitioner to share in his estate (Pet. App. 27-28). If there had been no property settlement, Kansas law would have permitted petitioner's wife to share in their combined holdings only to the extent that a court deemed it reasonable and equitable. In making that division, the court could consider such factors as the source of the property, the needs, ages and earning capacities of the parties, contribution of the parties, fault in the marriage and length of the marriage (Pet. App. 29).

These provisions of Kansas law parallel the provisions of Delaware law upon which this Court relied in *Davis* in concluding that the property settlement there was a taxable exchange. Thus, the property settlement could not be considered a nontaxable division of property between co-

owners. See *United States* v. *Davis, supra*, 370 U.S. at 68-71. In sum, neither the facts nor the applicable state law in the case at bar differs significantly from those involved in *Davis*.

2. Contrary to petitioner's further argument (Pet. 13-14), the decision below does not conflict with *Collins* v. *Commissioner*, 388 F. 2d 353 (C.A. 10). That case involved a division of property acquired through the joint efforts of the spouses which was required by Oklahoma law in connection with divorce proceedings. The Tenth Circuit initially held the transfer taxable. On remand from this Court (393 U.S. 215) to consider an intervening Oklahoma Supreme Court decision (*Collins* v. *Oklahoma Tax Commission*, 446 P. 2d 290), the Tenth Circuit held there was a nontaxable division of property between co-owners since, under applicable Oklahoma law, a wife had a co-ownership interest in jointly acquired property.[2] 412 F. 2d 211.

Unlike this case, *Collins* involved a division of jointly-acquired property under Oklahoma law, not of separate property brought into the marriage under Kansas law. As the court below observed (Pet. App. 27-35), a wife under Kansas law has no active or passive ownership interest in the separate property of her husband during marriage. Thus, the transfer in this case could in no sense be considered a non-taxable division of property between co-owners.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General

OCTOBER 1974.

[2]It should be noted that the Tenth Circuit's decision in *Collins* is open to question in the light of more recent decisions of the Oklahoma Supreme Court. It now appears that *Collins* v. *Oklahoma Tax Commission*, 446 P. 2d 290, overstated the nature of a wife's interest in jointly acquired property. See *McDaniel* v. *Oklahoma Tax Commission*, 499 P. 2d 1391, and *Sanditen* v. *Sanditen*, 496 P. 2d 365, where the Oklahoma Supreme Court held that a wife has an interest in jointly-acquired property only for purposes of divorce dispositions.